Sound Timber Contractor Sdn Bhd v Subur Tiasa Holdings Bhd & Ors

HIGH COURT (SIBU) — SUIT NO SBW-22NCvC-4/1 OF 2020
CHRISTOPHER CHIN JC
2 SEPTEMBER 2020

Civil Procedure — Striking out — Application for — Plaintiff brought action to claim outstanding contract fees due and owing by defendants to plaintiff — Defendants applied to strike out plaintiff's claim — Whether plaintiff's claim barred by limitation — Whether defendants' defence of limitations established

This was the defendants' applications seeking to strike out the claim by the plaintiff founded principally on the ground that the claims were all time barred in reliance upon the terms of the Sarawak Limitation Ordinance. Sometime in/around August 2009, the plaintiff alleged they were engaged by the first defendant as the logging contractor at Garu Camp, Kapit for felling, extraction, handling and transportation of all merchantable logs/timbers from the forest concession area concerned to the first defendant's designated log pond. The first defendant was the holding company for the second and third defendants. Later, the plaintiff was engaged by the first defendant as the logging contractor for Koyan and Bala Camps at Bintulu sometime in/around May 2011 and November 2011 respectively. Sometime in/around October 2014, the plaintiff ceased the logging operation at Garu Camp, Kapit whereby the plaintiff had later handed over the same to the first defendant with its consent and full knowledge. The plaintiff then received a notice of termination of service contract for Bala Camp from the second defendant, citing economic downturn factor as reason of termination. The plaintiff then handed over the Bala Camp back to the second defendant in November 2015. These crystallised into the plaintiff's claim, being in respect of the outstanding contract fees due and owing by the defendants to the plaintiff as well as for costs and expenses incurred for upgrading of the logging roads and logponds at Koyan and Bala Camps in the sum of RM6,480,000. Hence, these applications by the defendants.

Held, allowing the defendants' applications and striking off the plaintiff's claim:

(1) The plaintiff made no attempt to persuade the court against the defendant's defence of limitations. There was merely a denial in the plaintiff's reply. The court was not told how an interim payment and payment in kind by the first defendant in 2016 would enlarge the limitation period of three years not just against the first defendant but

also against the second and third defendants. Such non-opposition could be deemed an admission by the court. The defendants had successfully established the defence of limitations as against the claims by the plaintiff. The claims against the first, second and third defendants were time barred (see paras 25–27 & 29).

[Bahasa Malaysia summary

Ini adalah permohonan defendan yang ingin membatalkan tuntutan oleh plaintif yang didasarkan terutamanya dengan alasan bahawa tuntutan tersebut dihalang oleh had masa bergantung pada syarat-syarat Sarawak Limitation Ordinance. Suatu ketika pada/sekitar bulan Ogos 2009, plaintif mendakwa mereka telah dilantik oleh defendan pertama sebagai kontraktor pembalakan di Kem Garu, Kapit untuk penebangan, pengekstrakan, pengendalian dan pengangkutan semua balak/kayu yang dapat diperdagangkan dari kawasan konsesi hutan yang berkaitan dengan kolam balak yang ditetapkan defendan pertama. Defendan pertama adalah syarikat induk bagi defendan kedua dan ketiga. Kemudian, plaintif dilantik oleh defendan pertama sebagai kontraktor pembalakan untuk Kem Koyan dan Bala di Bintulu masing-masing pada sekitar Mei 2011 dan November 2011. Pada sekitar Oktober 2014, plaintif menghentikan operasi pembalakan di Kem Garu, Kapit di mana plaintif kemudian menyerahkan perkara yang sama kepada defendan pertama dengan persetujuan dan pengetahuan penuhnya. Plaintif kemudian menerima notis penamatan kontrak perkhidmatan untuk Kem Bala dari defendan kedua, dengan alasan faktor kemerosotan ekonomi sebagai alasan penamatan. Plaintif kemudian menyerahkan Kem Bala kembali kepada defendan kedua pada bulan November 2015. Ini membentuk tuntutan plaintif, berkenaan dengan bayaran kontrak tertunggak yang perlu dibayar dan terhutang oleh defendan kepada plaintif serta kos dan perbelanjaan yang dikeluarkan untuk menaik taraf jalan pembalakan dan kolam balak di Kem Koyan dan Bala dengan jumlah RM6,480,000. Oleh itu, permohonan-permohonan ini oleh defendan.

Diputuskan, membenarkan permohonan defendan dan membatalkan tuntutan plaintif:

(1) Plaintif tidak membuat percubaan untuk meyakinkan mahkamah terhadap pembelaan had masa defendan. Hanya terdapat penafian semata-mata dalam jawapan plaintif. Mahkamah tidak diberitahu bagaimana pembayaran dan pembayaran sementara oleh defendan pertama pada tahun 2016 akan memperbesar tempoh had masa tiga tahun bukan hanya terhadap defendan pertama tetapi juga terhadap defendan kedua dan ketiga. Ketiadaan penentangan seperti itu dapat dianggap sebagai pengakuan oleh mahkamah. Defendan telah berjaya membuktikan pembelaan had masa terhadap tuntutan yang dituntut oleh plaintif. Tuntutan terhadap defendan pertama, kedua dan ketiga dihalang oleh had masa (lihat perenggan 25–27 & 29).]

Cases referred to

Osman bin Abdul Ghani & Ors v United Asean Bank Bhd [1987] 1 MLJ 27, SC (refd)

Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 3 MLJ 609; [2015] MLJU 70, FC (refd)

Legislation referred to

Rules of Court 2012 O 18 r 19
Limitation Ordinance (Cap 49)

Grace Wong (Ling & Koung Advocates) for the plaintiff.
William Ting (Tang & Partners Advocates) for the defendants.

Christopher Chin JC:

[1] These are the broad grounds to the ruling for encls 12, 14 and 16. In these applications the defendants are seeking to strike out the claim by the plaintiff founded principally on the ground that the claims are all time barred in reliance upon the terms of the Sarawak Limitation Ordinance ('the SLO').

[2] The ruling was supposed to have been delivered on the 30 July 2020 but I had earlier requested parties to orally present their respective cases to me instead on the date of ruling.

[3] The narration of the facts of this case are necessary only to understand the underlying claim of the plaintiff. However, this decision is one based on the law of limitation.

KEY ISSUE

[4] This ruling revolves principally round the consideration of the defendants' defence of limitation under the SLO.

[5] The plaintiff went to great lengths to argue that were ongoing negotiations between the parties and their respective lawyers to settle this case and as a result there was forbearance and indulgence on the part of the plaintiff and such forbearance cannot, on the basis of decided cases, prejudice the plaintiff's claims against the defendants.

BRIEF FACTS

[6] Sometime in/around August 2009, the plaintiff alleges they were engaged by the first defendant as the logging contractor at Garu Camp, Kapit

for felling, extraction, handling and transportation of all merchantable logs/timbers from the forest concession area concerned to the first defendant's designated log pond.

[7] The first defendant is the holding company for the second and third defendants.

[8] Later, the plaintiff was engaged by the first defendant as the logging contractor for Koyan and Bala Camps at Bintulu sometime in/around May 2011 and November 2011 respectively:

(a) the contract work at Koyan at that material time included felling, extraction of merchantable timber logs from the forest area specified and transportation of the felled timber logs from the harvesting points to Koyan transit camp and thereafter to one Jelalong log pond, as well as all log pond related works and/or operation which included loading and unloading of timber logs at the log pond; and

(b) the contract work at Balaat that material time included felling, extraction of merchantable timber logs from the forest area specified and transportation of the felled timber logs from the harvesting points to Bala transit camp and thereafter to one Bala log pond, as well as all log pond related works and/or operation which included loading and unloading of timber logs at the log pond (Jelalong log pond and Bala log pond hereinafter collectively referred to as 'the said log ponds').

[9] At that material time, the roads leading to the said log ponds were in very bad condition. The plaintiff had carried out road repairs and maintenance works which included widening and restructuring of the roads leading from the respective Koyan's and Bala's transit camps to the said log ponds. The plaintiff had also carried out major repair works to the said log ponds as well as the wharf.

[10] Likewise, later, sometime in/around October 2014, the plaintiff ceased the logging operation at Garu Camp, Kapit whereby the plaintiff had later handed over the same to the first defendant with its consent and full knowledge. The plaintiff then received a notice of termination of service contract dated 3 August 2015 for Bala Camp from the second defendant, citing economic downturn factor as reason of termination. The plaintiff then handed over the Bala Camp back to the second defendant in November 2015.

THE PLAINTIFF'S CLAIM

[11] The facts of the case above crystallises into the plaintiff's claim, being in respect of the outstanding contract fees due and owing by the defendants to the

plaintiff as well as for costs and expenses incurred for upgrading of the logging roads and log ponds at Koyan and Bala Camps in the sum of RM6,480,000.

[12] The eventual claim by the plaintiff against the first to third defendants was as follows as prayed in its statement of claim ('enc1 2'):

(a) the sum of RM9,241,333.82 against the first defendant;

(b) the sum of RM382,686.66 against the first and second defendants jointly and severally;

(c) the sum of RM12,549.17 against the first and third defendants jointly and severally;

(d) the interest rate of 5%pa on the judgment sum until full and final payment;

(e) costs; and

(f) such further or other relief as the court deems fit.

THE DEFENCE

[13] The key substance of each of the three defendants are as follows.

[14] First defendant — in addition to the denial of liability as well as that the claims of the plaintiff were not supported by contract nor by documents, the first defendant also pleads laches and principally, that the claims were not brought within the limitation period and are therefore statute barred. Hence the first defendant avers that there was no reasonable cause of action against the first defendant.

[15] Second defendant — alleges that the timber extraction contracts were put at an end by the plaintiff themselves. The claims of the plaintiff were not supported by documentary proof of the work done. The accounts were therefore inaccurate and not acceptable. The amount owing was therefore denied. The second defendant also pleaded the defence of time bar.

[16] Third defendant — the defence was identical to that of the second defendant and again the limitation period was pleaded as a bar against the plaintiff's claim.

THE PLAINTIFF'S STAND

[17] At the hearing on the 30 July 2020 in opposing the applications by the defendants, the plaintiff's counsel sought to rely on the fact that the parties met and corresponded frequently in continuous negotiations while seeking a settlement of the disputed amount.

[18] It is to be noted that in these negotiations both parties were accompanied by their respective lawyers.

LEGAL ARGUMENTS

[19] The plaintiff's counsel relied on *Osman bin Abdul Ghani & Ors v United Asean Bank Bhd* [1987] 1 MLJ 27 which held that forbearance to sue cannot prejudice the claim.

[20] However, there is no statutory provision in the SLO which allow ongoing negotiations to automatically enlarge or extend the prescribed limitation period. Counsel for the plaintiff was unable to point to such provision in the SLO stating instead that the legislation was silent thus inviting this court to create a new condition in allowing an enlargement of the limitation period when in fact the legislature did not provide any and there was no evidence that they intended such.

[21] The plaintiff's counsel may have missed my point in court. There are two issues involved here:

> Firstly, I do not doubt or challenge the decided cases which have held that forbearance to sue or indulgence granted by a claimant does not prejudice the claimant's right to claim. In this present case, the plaintiff has every right to sue the defendants and the earlier negotiation for an amicable settlement does not prejudice such right.
>
> Secondly, having exercise its right to claim, the plaintiff must now deal with a second issue that is, to convince this court that its claim is not barred by limitation.

[22] The plaintiff's counsel has convinced me of the first issue but not the second.

[23] On the other hand, the defendant's counsel relied on the Federal Court case of *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] MLJU 70 where the Federal Court approved the Court of Appeal's decision that negotiation is not a bar to the defence of limitation. Excerpts from the decision of Azahar bin Mohamed FCJ (as he then was):

Counsel for the plaintiff argued that the defendant was estopped from relying on the defence of limitation in respect of the unlawful termination of the agreements as the defendant had induced the plaintiff to forbear from commencing court proceedings. He added that the defendant was estopped from raising the defence of limitation by reason that there were continuous negotiations between the parties on the termination of the agreements up until the filing of the present action and that the defendant had encouraged the plaintiff to believe that it did not have to pursue legal remedies to enforce the agreements. Relying on the case of *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 451, learned counsel argued that the defendant was estopped from relying on the statute of limitation for otherwise, the statute of limitation would be used as an engine of fraud.

On the limitation issue, we conclude by saying that time commence to run for the purposes of the 1953 Act from 18 March 1975, Therefore the plaintiff should have filed its claim on or before 17 March 1981 to preclude the same from being defeated by the defence of limitation. Since the plaintiff filed this claim on the 8 October 2004, it is barred by limitation.

[24] Counsel for the plaintiff then elaborated on the merits (or the lack) of the defendant's case.

[25] However, and crucially, the plaintiff made no attempt to persuade this court against the defendant's defence of limitations. There was merely a denial in the plaintiff's reply (para 19 of the reply ('encl 18') in respect of the first defendant, para 10 of the reply ('encl 19') in respect of the second defendant and para 8 of the reply ('encl 20') in respect of the third defendant).

[26] This court was not told how an interim payment and payment in kind by the first defendant in 2016 would enlarge the limitation period of three years not just against the first defendant but also against the second and third defendants.

[27] The authorities are legion where such non-opposition can be deemed an admission by this court.

[28] Counsel for the defendants reminded this court that limitation was an absolute defence. He also pointed out to this court that as against the second and third defendant the plaintiff had no cause of action.

CONCLUSION

[29] The defendants have successfully established the defence of limitations as against the claims by the plaintiff. The claims against the first, second and third defendants are time barred. By virtue of O 18 r 19 of the Rules of Court 2012, I accordingly order as follows:

(a) I allow encls 12, 14 and 16 on the terms prayed;

(b) the statement of claim ('encl 2') against the first, second and third defendants is struck out; and

(c) costs to each defendant of RM1,000.

Defendants' applications allowed and plaintiff's claim struck off.

Reported by Nabilah Syahida Abdullah Salleh